No. 15176.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MAURICE PENN,

Appellant,

vs.

WILLIAM R. GRANT, Trustee in Bankruptcy of L. R. MAHAN, also known as LEMUEL ROSS MAHAN,

Appellee.

APPELLEE'S ANSWERING BRIEF.

FRANK M. CHICHESTER,
453 South Spring Street,
Los Angeles 13, California,
Attorney for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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TABLE OF AUTHORITIES CITED

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Preliminary Statement.

The preliminary statement as set forth in appellant's opening brief correctly states the facts that are pertinent to this appeal. The statement as to jurisdiction is also correct. The facts as outlined by the appellant are essentially correct with the exception that the husband of the witness referred to did not testify in the proceedings before the referee in bankruptcy.

Question Presented.

The sole question to be determined by this Court is whether the bankrupt was insolvent on or about September 16, 1953, the date of the levy of attachment in question.

POINT ONE.

The Determination of Insolvency Is One of Fact to Be Determined by the Trier of Facts.

Insolvency is defined in Section 1(19) of the Bankruptcy Act (11 U. S. C. Sec. 1(19)). That definition follows:

> "A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at a *fair valuation* be sufficient in amount to pay his debts." (Emphasis added.)

The cases wherein the matter of the determination of the insolvency of a person is involved are usually where an involuntary petition in bankruptcy has been filed against an individual and the matter of determining the solvency or insolvency of that individual must be found by the Court. The fourteenth edition of Collier on Bankruptcy, volume 1, pages 77 and 78, has this to say on the point involved before the Court:

> "Where the validity of a note or account is seriously disputed some Courts have heavily discounted it in arriving at a valuation; others, presumably unwilling to go into collateral issues have allotted no value to it."

In the case of *First National Bank v. Wyoming Ice Co.* (D. C. Pa.), 14 A. B. R. 448, 136 Fed. 466, a contested lawsuit was alleged to be an asset. The Court refused to give it any value in determining the matter of insolvency.

In the case of *Houghton Wool Co. v. Morris* (C. C. A. 1), 41 A. B. R. 271, 249 Fed. 434, an alleged asset was a claim that might be a valid claim after protracted litigation. The Court refused to consider it as an asset in determining the question of insolvency.

In the *Matter of Cooper* (D. C. Mass.), 12 F. 2d 485, 7 A. B. R. (N. S.) 643, the Court held that a doubtful and disputed claim for unliquidated damages resulting from breach of contract should not be considered as an asset in determining whether the alleged bankrupt was insolvent. At page 486 the Court used the following language:

> "The test seems to be whether the claim is one that can be rendered available for the payment of debts within a reasonable time."

At the time of the hearing before the referee the alleged usury action referred to in the schedules of the bankrupt had been pending since September, 1953, and was still not at issue. Certainly this is not the type of claim that can be rendered available in cash for the payment of debts within a reasonable time.

The appellant strongly contends that the appellee has failed to sustain the burden of proof of insolvency of the bankrupt on the date of the attachment. Reference is made by the appellant to the testimony of the wife of the bankrupt to the effect that she felt that the Seaboard Finance Company was indebted to her in the amount of some $81,000.00. [Tr. of Rec. pp. 42-43.] It should be remembered that there was introduced into evidence the schedules filed by the bankrupt from which it appeared that without the claim based upon usury, the bankrupt was hopelessly insolvent on September 16, 1953, the date of attachment. [Tr. of Rec. p. 13.]

It was the duty of the referee as the trier of facts to give such weight to the testimony of the wife of the bankrupt as he should deem fit. From the conclusion of the referee, affirmed by the District Court, it appears that the testimony of the witness concerning the value of the usury claim was rejected in whole and the referee relied upon the authorities cited above in determining that the bankrupt was actually insolvent on the date of attachment.

It is respectfully submitted that the order of the District Court affirming the order of the referee should be affirmed.

Respectfully submitted,

FRANK M. CHICHESTER,

Attorney for Appellee.